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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MELLON BANK, N.A., and
GRANT STREET NATIONAL BANK (IN LIQUIDATION)
Respondents,

vs.

METRO COMMUNICATIONS, INC., t/a METROSPORTS
Respondent,

vs.

THE COMMITTEE OF UNSECURED CREDITORS,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT BRIEF OF RESPONDENTS MELLON BANK, N.A. AND GRANT STREET NATIONAL BANK (IN LIQUIDATION) IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This petition has its origins in a challenge to the enforceability of a bank's security interest in the assets of a debtor in a reorganization case under the Bankruptcy Code. The parties are Mellon Bank, N.A. ("Mellon"), which took the security interest to secure repayment of loans made to the debtor and its parent corporation prior to the bankruptcy; Grant Street National Bank (In Liquidation) ("GSNB"), which has acquired all Mellon's claims against the debtor; and the debtor's official committee of unsecured creditors (the "Committee"), which challenged Mellon's security interest as a "voidable preference" under Section 547 of the Bankruptcy Code, 11 U.S.C. § 547. The court of appeals (the "Third Circuit") rejected this challenge in *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635 (3d Cir. 1991). The questions presented in the petition relate solely to the Third Circuit's allegedly erroneous application of the "clearly erroneous" standard in its review of the trial court's findings of fact. Believing that this standard is well defined by prior decisions of this Court and that the case does not present any special or important circumstances warranting this Court's review, Mellon and GSNB (together, the "Banks") respectfully submit this brief in opposition to the grant of the petition.[1]

I. STATEMENT OF THE CASE

A. Procedural History

On March 15, 1985, Metro Communications, Inc. d/b/a Metrosports ("Metro") filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Pennsylvania. Prior to the Chapter 11 filing, Mellon had made loans to Metro and taken a security interest in Metro's assets. Soon after the Chapter 11 filing, Mellon filed an adversary proceeding against Metro and another creditor, the Pacific-10 Conference (the "PAC-10") to determine the validity, priority and extent of Mellon's security interest. The primary

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[1] Mellon is a wholly owned subsidiary of Mellon National Corporation, a publicly held company. GSNB is a publicly held company. Neither bank has any subsidiaries except for wholly owned subsidiaries.

purpose of the suit was to determine the parties' respective rights in an escrow account comprising the proceeds of certain of Metro's accounts receivable that the PAC-10 had attempted to attach immediately before Metro's Chapter 11 filing. The PAC-10, Metro, and Mellon have agreed to a settlement of their disputes over the escrow account, and have presented the settlement to the Bankruptcy Court for approval. The Bankruptcy Court has indicated that it will defer ruling on the merits of the proposed settlement until this proceeding is resolved.

Metro did not dispute the enforceability of Mellon's security interest. However, the Committee intervened in the adversary proceeding, claiming that the security interest was a voidable preference. Specifically, the Committee contended that the perfected status of Mellon's security interest lapsed when Mellon failed to file "UCC-1" financing statements in Pennsylvania within four months after Metro moved its chief executive office to this state. It is undisputed that Metro moved its headquarters from Rockville, Maryland to Pittsburgh, Pennsylvania at some point prior to the bankruptcy filing, and that Mellon filed its financing statements in Pennsylvania less than ninety days before the Chapter 11 filing date. The Committee argued that, unless Mellon's Pennsylvania UCC-1 filings were made within four months after the change in the location of Metro's chief executive office in accordance with Section 9-103 of the Uniform Commercial Code, the continuity of the perfection of Mellon's security interest would be broken, and the security interest could be avoided as a preference. Thus, the principal question presented to the bankruptcy court was when the change in the location of Metro's chief executive office took place.[2]

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[2] The Committee asserted several other claims again Mellon, all of which were resolved against the Committee at one or another stage in the proceedings below. Some of these contentions, including the Committee's attack on Metro's guaranty of loan obligations of its corporate parent to Mellon under the "fraudulent conveyance" provisions of 11 U.S.C. § 548, are addressed in the Third Circuit's opinion. The Committee's Petition for a Writ of Certiorari does not seek review of any of the rulings of the Court of Appeals on these questions.

On February 10, 1989, after a two-day bench trial, the bankruptcy court issued a memorandum opinion and an order holding in pertinent part that Mellon did not possess a valid security interest in Metro's assets. App. 53.[3] The Bankruptcy Court's memorandum opinion and order are reported at 95 Bankr. 921 (Bankr., W.D. Pa. 1989).

Mellon and GSNB (to which Mellon had assigned its claims) appealed this ruling to the district court. On February 12, 1991, the district court issued a three-page order affirming the bankruptcy court's rulings in all relevant respects. App. 47. The district court's order is unreported. Mellon and GSNB each filed an appeal to the Third Circuit, which consolidated the appeals for purposes of disposition. On September 25, 1992, the Third Circuit issued its opinion holding in pertinent part that the bankruptcy court erred in its conclusion that Metro moved its headquarters to Pittsburgh more than four months before Mellon filed its financing statements in Pennsylvania.

The Committee's petition presents the following questions for review:

1. "Whether the location of a company's 'chief executive office' under section 9103(c)(4) of the Uniform Commercial Code is a 'question of law' or a 'question of fact', subject to the restrictions of the 'clearly erroneous' standard of review?"

2. "Whether the trial court's determination that the debtor's 'chief executive office' was in Pennsylvania was 'clearly erroneous' when, *inter alia*, its chief executive officer, chief financial officer and other financial management were located in Pittsburgh?"

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[3] Page references are to the "Joint Appendix" filed by Mellon and GSNB in the Third Circuit, except for page references preceded by "App.," which are references to the Appendix to the Committee's petition.

B. Factual Background

1. *Metro and Its Affiliates*

Metro is a Maryland corporation formerly engaged in the business of television and radio sports syndication. This business involved acquiring the rights to broadcast sporting events, contracting with radio and television stations for such broadcasts, selling rights to advertise during the broadcasts, and arranging for the production of the broadcasts. Under the direction of three individuals: Lenny Klompus, Marcia Cherner, and Paul Karlsson, Metro developed a pre-eminent reputation in the sports syndication industry during the late 1970's and early 1980's [344A-355A, 812A, 844A, 857A, and 867A].

In April, 1984, Metro's stockholders sold all their stock in the company to Total Communications, Inc. ("TCI"). TCI was a wholly owned subsidiary of Total Communication Systems Co. ("TCS"), which was controlled by a Pittsburgh businessman named Nelson Goldberg. TCS owed several mobile television production facilities, and was in the business of producing "live" and delayed radio and television broadcasts of football games, basketball games, and other sporting events and programming specials. TCS hoped to capitalize on Metro's reputation in the area of broadcasting rights syndication, while Metro hoped to capitalize on TCS's reputation in the field of television production. However, the companies continued to operate as separate and distinct entities. Metro's pre-acquisition management team (consisting of Lenny Klompus, President; Marcia Cherner, Vice President/Administration; and Paul Karlsson, Vice President/Production and Programming) remained in place, and continued to manage the company's day-to-day operations from its headquarters in Rockville, Maryland.

Through the summer and fall of 1984, acting under the name "Metro Communications, Inc." or its "Metrosports" trade name, Metro continued to acquire substantial broadcasting rights to college football and basketball games, arrange with radio and television stations for the airing of the games, and sell advertising

time to commercial sponsors. All these activities were managed by Klompus, Chemer, and Karlsson out of the Rockville headquarters office. Conversely, if Metro contracted with TCS for the production of a sporting event, the technical execution of the production would be handled exclusively by TCS's production staff, operating out of TCS's offices in Pittsburgh, Pennsylvania. [338-350A, 473A, 550-554A, 557-558A, 646-648A]

In mid-November, 1984, Metro decided to close its Rockville office and move its operations to Pittsburgh, where TCS was located. On November 19, 1984, the company issued a press release, announcing that ". . . the METROSPORTS headquarters, previously in Rockville, Maryland, are being moved into the firm's new RIDC Industrial Park building, in O'Hara Township, effective December 3." A substantial portion of Metro's files were moved from Rockville to Pittsburgh in mid-December. The balance of Metro's files were recovered from Klompus and moved from Maryland to Pittsburgh in mid-May, 1985. The Rockville headquarters office was closed by the end of December. Shortly thereafter, Klompus, Chemer, and most of the other Metro employees formerly based in Rockville left the company. [359-360A, 449-450A, 555-556A, 841A, 998A, 999A]

2. *The Mellon Loans*

To finance the purchase of the Metro stock, TCI borrowed $1,850,000 from Mellon on April 6, 1984. On the same day, Mellon loaned Metro $2,300,000 for use as working capital. Several months later, Mellon agreed to issue certain letters of credit for the account of Metro and for the benefit of the PAC-10, and Metro agreed to reimburse Mellon for all amounts drawn under the letters of credit. TCI guaranteed Metro's obligations to Mellon, Metro guaranteed the repayment of the loan to TCI, and TCS and its parent corporation, Mass Communications and Management, Ltd. ("MCM"), guaranteed the obligations of both Metro and TCI. [338A, 470-473A, 720A, 722A, 728A and 732A]

To secure the payment of Metro's obligations, Metro and Mellon entered into a Security Agreement dated April 6, 1984 [765A]. Under the Security Agreement, Metro granted Mellon a security interest in substantially all of Metro's property, including its general intangibles and accounts receivable.

Mellon perfected its security interest in Metro's assets by filing UCC-1 financing statements in the appropriate filing offices in Maryland. After Metro closed its headquarters office in Rockville, Maryland and moved most of its operations to Pittsburgh, Mellon filed financing statements in Pennsylvania in order to continue the perfected status of its security interest in Metro's assets in accordance with § 9103(c)(5) of the Pennsylvania Uniform Commercial Code, 13 Pa. C.S.A. § 9103(c)(5). Mellon's Pennsylvania filings were made on or before February 5, 1985, two months after the date announced by Metro as the effective date of the relocation of its headquarters to Pittsburgh. [21-22A, 50-57A, 980A].

3. *Metro's Chapter 11 Filing*

On June 27, 1984, this Court issued its opinion in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), affirming a lower court decision that struck down, on antitrust grounds, a system of restrictions imposed by the NCAA on the televising of college football games of member institutions. This decision was widely expected to create a bonanza for sports programming syndicators such as Metro. Unfortunately, precisely the opposite occurred. Broadcasting markets were suddenly flooded with sports programming. Faced with increasing competition for limited air time, Metro had to offer greater concessions to radio and TV stations in order to get its sports programming on the air. Advertisers, confronted with a sudden increase in the volume of available sports programming, dropped their rates. As a result, Metro was caught in a squeeze between diminishing revenues and fixed costs—principally, the substantial rights payments that it had committed to pay to colleges and athletic conferences under long-

term rights syndication contracts. [469A-476A]. Finally, on March 15, 1985, as a result of an attachment proceeding brought by the PAC-10, Metro was obliged to seek relief under the Bankruptcy Code.

II. SUMMARY OF ARGUMENT

The issues in this case, concerning the Third Circuit's interpretation of a state statute, do not rise to the magnitude necessary to justify Supreme Court intervention. Case law is clear that a determination involving the application of standards of law to underlying or evidentiary facts presents a mixed question of fact and law, subject to plenary review. In a case such as this one, the determination of the location of a corporation's chief executive office can be made only by sifting and weighing evidentiary facts in order to assay their legal significance. That is, in determining the location of a chief executive office, the court is involved not merely in resolving conflicts in proof and evaluating testimonial evidence (the classic function of a finder of fact), but also in applying a dual-faceted standard of law, focusing on the (i) the main part of the debtor's business operations and (ii) the reasonable expectations of creditors. In the instant case the Third Circuit correctly held that the bankruptcy court erred in its application of this standard to the narrative evidence in, *inter alia*, (i) placing the burden of proof on Mellon, (ii) ignoring relevant evidence, (iii) and improperly placing excessive reliance on other evidence. The collective effect of all these errors of law was that the bankruptcy court drew an incorrect legal conclusion as to the time when Metro moved the chief executive office. Thus, the Third Circuit was well within the parameters of the "clearly erroneous" standard in reversing the bankruptcy court's legal conclusion. However, even if the question of the location of a chief executive office were purely a question of fact, the Third Circuit met the clearly erroneous standard when it determined that the evidence could result in only the one conclusion: that Metro moved its chief executive office to Pittsburgh in December of 1984.

III. ARGUMENT

A. The Issue Below.

The main issue raised by the Committee was whether the perfection of Mellon's security interest in Metro's accounts receivable and general intangibles lapsed before Mellon made its UCC-1 filings in Pennsylvania in the first days of February 1985. The Pennsylvania filings were made within ninety days before Metro filed its Chapter 11 Petition. This was of no significance if the Pennsylvania filings merely preserved the continuously perfected status of a security interest initially perfected by the Maryland filings before the ninety day period began. However, if the Maryland filings had lapsed, then (so the Committee's argument went) the reperfection of Mellon's security interest would be effective only as of the date of the Pennsylvania filings, and Mellon's security interest would be deemed a preferential transfer on account of antecedent debt, avoidable under 11 U.S.C. § 547.

Because of the nature of Metro's business, most of its assets consisted of accounts receivable and general intangibles, including broadcast syndication rights and contracts with various advertisers, advertising agencies, and radio and television broadcasters. Both Pennsylvania and Maryland have adopted the 1972 version of the Uniform Commercial Code, which provides that the law of the jurisdiction "in which the debtor is located" governs the perfection of a security interest in accounts and general intangibles. The statute goes on to provide that:

> a debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. . . . [a] security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period,

> it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.

13 Pa. S. § 9103(c)(4) and (5).

It was undisputed that, both before and after its acquisition by TCI, Metro maintained more than one place of business. During 1984, Metro maintained sales offices in Los Angeles and, for a time, in New York. [339A, 395A]. In addition, beginning some time in August or September, 1984, cash management services for TCS and all its subsidiaries were centralized in Pittsburgh under the direction of Gail Schelat, who served as Chief Financial Officer for both TCS and Metro. [336A, 339A]. Thus the question boiled down to whether Mellon's Pennsylvania UCC-1 filings were made within four months after Metro moved its "chief executive office" from Rockville, Maryland to Pittsburgh. The banks believe this move occurred on or after December 3, 1984, the date announced by Metro in its November 19, 1984 press release as the effective date of the relocation of its headquarters to Pittsburgh. [980A]. Of course, even if the change occurred before the Rockville headquarters were closed, the perfection of Mellon's security interest would still relate back to its original Maryland filings unless the chief executive office had been moved to Pittsburgh before the beginning of October, four months before the Pennsylvania filings were completed.

The term "chief executive office" is not defined in the Uniform Commercial Code, but the Official Comment to § 9-103 explains its meaning:

> 'Chief executive office' does not mean the place of incorporation; it means the place from which in fact the debtor manages the main part of its business operations. This is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing.

"Clearly, the drafters of [§ 9-103] contemplated a two-fold inquiry focusing first on the 'place from which . . . the debtor manages the main part of his business operations' and second, on the reasonable expectations of creditors." *Aoki v. Shepherd Machinery Co. (In re J.A. Thompson & Son, Inc.)*, 665 F.2d 941, 949 (9th Cir. 1982), quoted in *Jarboe v. United Bank of Denver (In re Golf Course Builders Leasing, Inc.)*, 768 F.2d 1167, 1170 (10th Cir. 1985). As both *Aoki* and *Jarboe* illustrate, this inquiry involves much more than simple findings of fact; it involves judicial construction of the governing state statute. The Third Circuit's decision in this case is squarely in line with the analytical approach employed by the Ninth and Tenth Circuits.

B. The Third Circuit Correctly Determined That the Location of Metro's Chief Executive Office Was a Question of Law.

The Committee apparently wishes this Court to find that the question of the location of Metro's chief executive office must be a question of "fact" because (i) a "layman doesn't have to employ a legal standard to determine" the location of the chief executive office of a business and (2) the comment to UCC section 9103(c)(4) states that the chief executive office [is] "the place from which *in fact* the debtor manages the main part of his business operations." Committee's Brief, 15. The emphasis that the Committee wishes to have placed on the use of the word "fact" here is misplaced. The issue of what constitutes a "fact" and what constitutes a "legal conclusion" is not that simplistic. As this Court has stated, the distinction between a "question of law" and a "question of fact" is "often not an illuminating test . . . and never self-executing." *Baumgartner v. United States*, 322 U.S. 665, 671 (1944). *See also Miller v. Fenton*, 474 U.S. 104, 113 (1985); *Pullman-Standard v. Swint*, 456 U.S. 288 (1982).

Findings of "fact" take place on a variety of levels. At the lowest level, the Court makes a determination of whether an event happened. This determination may rest on the evaluation of the credibility of a witness or the resolution of conflict in proofs

presented. At this level, the trial court is applying only "those ordinary principles of logic and common experience which [are] ordinarily entrusted to the finder of fact." *Bose Corp. v. Consumer's Union, Inc.*, 466 U.S. 485, 501 n.17 (1984). The finding of these base-level facts constitutes a pure finding of fact. A reviewing court may not overrule a lower court's decision as to the base-level facts unless that decision is clearly erroneous. When, however, the resolution of the issue requires that the court apply standards of law to the base-level facts in order to interpret their legal significance, this determination becomes a question of mixed fact and law. *Daniels v. Allen*, 344 U.S. 443, 507 (1953). It is at this point that the determination can be said to have "crossed the line . . . into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment." *Bose*, 466 U.S. at 501 n.17. This difference between the lowest and the higher levels of the "fact-finding" process has also been described as the difference between narrative facts and ultimate facts. An "ultimate fact" is one which is made by the application of standards of law to "subsidiary facts."[4] *Baumgartner v. United States*, 322 U.S. 665, 670, 71 (1944).

Regardless of the way in which the process is labeled, the truth remains that the ultimate end of such a process (the ultimate "fact") is really not a "fact" at all, but rather "a legal inference from other facts." As such it is subject to review free of the restraining impact of the so-called "clearly erroneous" rule applicable to ordinary findings of fact by the trial court. *Lehmann v. Acheson*, 286 F.2d 592, 594 (3d Cir. 1953); *See also In Re Abbots Farm Dairies of Pennsylvania*, 788 F.2d 143, 147 (3d Cir. 1986) (Where a decision is made as to an ultimate fact, the court exercises

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[4] This use of the word "ultimate fact" to mean a conclusion reached by the application of legal standards to basic facts must be distinguished from the use of the word "ultimate fact" merely to indicate a fact which is dispositive of the issue confronting the court. As this Court has stated, a purely fact determination is not exempted from the clearly erroneous standard merely because the result in the case turns upon that factual determination. *Pullman-Standard*, 456 U.S. at 287 n. 16.

plenary review over the legal standards applied by the bankruptcy and district courts in determining that fact); *Schultz v. Wheaton Glass*, 421 F.2d 259, 267 (3d Cir. 1970)(court is not bound by conclusions which are merely legal inferences from narrative facts); *Aoki v. Shepherd Machinery Co. (In re J.A. Thompson & Son, Inc.), supra*, 665 F.2d 941, 951 (9th Cir. 1982) (the "clearly erroneous" standard of review applies where "a trial court resolves disputed issues of fact by reference to the credibility of conflicting evidence[;]. . . [i]t has no application where the trial judge applies a legal standard to undisputed facts").

Cases determining the location of a chief executive office tend to follow a common pattern: the trial court is presented with vast quantities of detailed evidence concerning the debtor's activities, much of it in the form of ordinary business records, and little or none of it intrinsically controversial. The difficulty these cases present is not resolving disputed issues of fact, but rather, sifting through the mass of evidence to determine which facts are relevant, and which of the relevant facts are entitled to the most weight. *Aoki* and *Jarboe*—the two court of appeals' decisions cited by the bankruptcy court—both exemplify this pattern. It is noteworthy that in each of these cases, the district court reversed the bankruptcy court and was in turn affirmed by the court of appeals. In each case, the court of appeals ruled that the questions presented were questions of law or of the application of law to undisputed facts, and that the appellate court's scope of review was plenary.

The present case does not deviate from this pattern. There was almost no conflict in the testimony of the witnesses, and much of the evidence presented was in the form of business correspondence, memoranda, invoices, tax returns, financial statements, and other records generated in the ordinary course of business. The bankruptcy court's discussion of this evidence included several sweeping factual assertions that the Banks believe are clearly erroneous. However, the bankruptcy court's most fundamental errors were not in its factual findings, but in its application of the law to the undisputed facts. These are errors that the Third Circuit

had plenary power to correct, just like the appellate courts in *Aoki* and *Jarboe*.

A close look at the Third Circuit's opinion in this case illustrates this distinction between a finding of fact and a conclusion resulting from the application of standards of law to that fact. It is clear upon the face of the opinion that the Third Circuit did not disturb the bankruptcy court's findings of narrative fact. Rather, the court of appeals corrected the bankruptcy court's erroneous determination of the legal consequences of those facts.

The court of appeals pointed out myriad respects in which the bankruptcy court's legal analysis was flawed. The first fundamental error of law made by the bankruptcy court was placing the burden of proof on Mellon, an error which "materially permeated [the bankruptcy court's] factual findings." App. 15. Although the Committee seems reluctant to concede the issue, *See* Committee's Brief at 19, the Committee has not requested this Court to review the Third Circuit's holding on the burden of proof.

Second, the Third Circuit faulted the bankruptcy court's application of legal standards to the underlying facts before it, rejecting the bankruptcy court's conclusion as a "questionable" application of the relevant provisions of the UCC. As aptly summarized by the Third Circuit, "the bankruptcy court basically concluded that Metro, over time, came under the control of its parent corporation, TCS, and thus Metro's headquarters became those of TCS." The Third Circuit pointed out that the bankruptcy court's analysis was the result of a "mechanistic application of factors deemed relevant in other cases," and did not take into account those factors uniquely pertinent to a case where one corporation is acquired by another. In particular, the appellate court pointed out that the bankruptcy court had disregarded the presumption that a wholly owned subsidiary is an entity separate from its parent, and that "to require creditors to analyze and understand the internal power structure of related corporations to determine whether the wholly owned subsidiary was truly independent from its parent corporation . . . would introduce great

uncertainty into commercial transactions." App. 16-17. In discussing this error, the Third Circuit did not disturb the factual findings relied upon by the trial court. Rather, the Third Circuit explained the inappropriateness of relying on these facts to the degree that the lower court did so. App. 17. This was not a rejection of the bankruptcy court's findings of basic fact. Rather it was a critique of the lower court's legal analysis.

The other flaws in the trial court's reasoning pointed out by the Third Circuit follow a similar pattern. For example, the Third Circuit concluded that the bankruptcy court gave too much weight to internal memoranda sent by Klompus to Goldberg, since these memoranda were not accessible to creditors. The Third Circuit did not disturb the bankruptcy court's finding of fact as to the existence of the memoranda. Rather, the Third Circuit corrected the bankruptcy court's undue reliance upon those internal memoranda. App. 17. Similarly, the Third Circuit thought the bankruptcy court had given undue weight to the consolidation of Metro's accounting and cash management functions with those of its affiliates in Pittsburgh, since these functions were secondary to Metro's main business, and centralization of these functions within a corporate family is a common practice, entirely consistent with the operation of the group's members as separate enterprises. That those functions were consolidated in Pittsburgh was an undisputed fact, and the Third Circuit did not suggest otherwise. Likewise, the Third Circuit did not disturb the bankruptcy court's finding that, over time, Metro's rights acquisition and sales activities became subject to Nelson Goldberg's ultimate approval. Instead, the Third Circuit stated that this narrative fact was entirely consistent with the "main part" of the company's activities "being centered in the Rockville office until it was closed in December of 1984," and thus could not support a legal inference that Metro's "chief executive office" had been moved before that time. App. 18.

The analytical approach employed by the Third Circuit is the same as that used by the appellate courts in *Aoki* and *Jarboe*. As the Committee admits, those two decisions clearly demonstrate that determining the location of a company's "chief executive office"

can present legal as well as factual questions. In both *Aoki* and *Jarboe*, the trial court was reversed not because of erroneous factual findings, but because the trial court "erroneously construed § 9103 ..." *Aoki*, *supra*, 655 F.2d at 951; *see Jarboe*, *supra*, 765 F.2d at 1169. Although the Committee strives mightily to distinguish these cases on the ground that they arose "in the context of 'undisputed facts'," Committee Brief, 12, the same is true of the instant case. In all three cases, the trial's court's erroneous construction of UCC § 9103 stemmed from insufficient consideration given to some undisputed facts and undue emphasis given to others.

In short, the Third Circuit's opinion leaves the bankruptcy court's findings of fact undisturbed; only the legal inference drawn from those findings of fact was reviewed and found erroneous. The Third Circuit in this case simply performed its statutory duty to review the legal conclusions of the lower courts. This review was well within the limits of the Third Circuit's power. Despite the Committee's concerns for the morale of the trial court, allowing the Third Circuit opinion to stand will wreak no havoc upon the balance of power between trial and appellate court or upon the court system as a whole.

C. Even if the Question Presented Were One of Fact, the Third Circuit's Decision Would Have Satisfied the "Clearly Erroneous" Standard.

The Third Circuit correctly characterized the bankruptcy court's analysis as producing a mixed determination of law and fact, subject to plenary review. However, even assuming *arguendo* that the question of the location of Metro's chief executive office were a purely factual determination, the Third Circuit's decision would still be well within the parameters of the "clearly erroneous" standard. That standard does not require the reviewing court to find a complete lack of evidence in support of the lower court's findings. Rather, it allows for reversal whenever the "reviewing court on the entire evidence is left with the definite and firm

conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948).

The Third Circuit was clearly convinced that such a mistake had been made in the instant case. As the court of appeals noted, the bankruptcy court ignored a wealth of uncontroverted evidence that supported the Banks' contentions, including the press release announcing the move of Metro's headquarters from Rockville to Pittsburgh effective in early December. There was ample evidence introduced at trial that Metro "managed the main part of its business operations" from its Rockville headquarters until early December, 1984. As noted above, Metro's business consisted of acquiring the rights to broadcast athletic events on radio and television, and exploiting those rights by selling advertising time during the broadcasts to various commercial sponsors. There were five main facets to Metro's business: (i) negotiating with various colleges, athletic conferences, and bowl committees for the broadcasting rights; (ii) making arrangements with radio and television stations to air the various athletic events; (iii) selling advertising time for the broadcasts; (iv) contracting for the production of the radio and television broadcasts; and (v) hiring the "talent" (*e.g.*, the play-by-play and color announcers) for the broadcasts. [344A]. All five of these functions were managed out of the Rockville headquarters until December, 1984. Lenny Klompus, Metro's President, was the person primarily responsible for negotiating rights contracts with athletic conferences, schools, and bowl committees. [343A, 650A]. Marcia Chemer (also known as Marcia Klompus after her marriage to Lenny Klompus) was Vice President/Administration of Metro, and was the person primarily responsible for negotiating arrangements with radio and television stations to broadcast the various athletic events to which Metro owned the rights. [343A, 354A, 610A]. Paul Karlsson, Vice President/Production and Programming, was in charge of contracting with third parties for the production of the broadcasts. [343A, 611A]. Klompus was the executive producer of all of Metro's sports programming until he left the company in December, 1984. [554A, 608A].

All three of these officers were based in Rockville, Maryland prior to TCI's acquisition of Metro, and continued to operate out of the Rockville headquarters office until December, 1984. [341A, 614A]. In addition, Metro maintained three support personnel in Rockville during this period. Metro maintained no salaried employees in Pittsburgh prior to December, 1984. [341A, 614A]. Most of Metro's books and records were located in Maryland, either at the Rockville headquarters office or at Klompus's home, until December 17, 1984 or later. [448A, 556A].

Virtually all of Metro's revenues were derived from two sources: advertising sales, and fees paid by radio and TV stations for the right to broadcast the sports programming produced by Metro. [353A]. Through November, 1984, all revenues from these sources were generated by the Rockville office, under the direction of Klompus and Karlsson (who shared responsibility for advertising sales) and Cherner (who handled Metro's relations with radio and TV broadcasting). [342A, 353A, 434A, 442A].[5]

By the same token, there was ample evidence that the location of Metro's chief executive office in Rockville conformed to the "reasonable expectations of creditors." Until December, 1984, Metro clearly and unambiguously identified Rockville as its headquarters in its communications and dealings with taxing bodies, athletic conferences, universities, bowl committees, radio and television stations, advertisers and other trading partners. Specifically:

- Metro's contracts for the acquisition of broadcasting rights designated the company's Rockville, Maryland address as its place of business and the place to which notices addressed to Metro should be sent. These contracts, involving

[5] The Committee's statement at page 7 of its Brief that Goldberg "personally sold advertising" for Metro is misleading. There was uncontradicted evidence that Goldberg did not become active in advertising sales for Metro until after Klompus left the Company in December. Before then, Metro advertising sales were handled exclusively by Klompus and Karlsson. [420A, 442A-443A].

broadcasting rights worth many millions of dollars, were the foundation of Metro's business. [345A, 375A, 812A, 844A, 857A and 867A].

- Tax returns filed by Metro in 1984 and early 1985 with the Internal Revenue Service, the State of California, and the State of Maryland all list the Rockville headquarters office as Metro's address. [635A, 798A and 803A].

- An "Application for Automatic Extension of Time to File Corporation Income Tax Return," filed by MCM with the Internal Revenue Service on December 12, 1984, listed Metro as a corporate subsidiary that would be included in MCM's consolidated 1984 return, and listed the Rockville headquarters office as Metro's address. [637A. 805A].

- The September 7, 1984 Letter of Credit Agreement between Mellon and Metro listed Metro's Rockville headquarters address as the address to which notices were to be sent to Metro. This agreement also contains affirmative representations by Metro that Mellon's security interest in Metro's assets was perfected by filings in the appropriate offices, and that except for continuation statements every five years, no additional filings were required. [743A].

- Metro's stationery letterhead designated its Rockville, Maryland office as its principal mailing address and headquarters. [316A, 838A, 841A, 852A, 854A, 893A, 896A, 919A, 930A, 972A, and 1010A].

- Representatives of the colleges, bowl committees and athletic conferences all communicated directly with Klompus, Chemer and Karlsson in Rockville, Maryland regarding the day-to-day details and logistics of broadcasting the sporting events syndicated by Metro. [348A, 873A, 855A, 867A and 870A].

- Advertisers and advertising agencies entered into contracts with Metro that specified Rockville, Maryland as Metro's location and mailing address, and bills to advertisers and advertising agencies were sent out from Rockville. [893A, 927A, 930A, 970A and 972A].

- Radio and television stations negotiated with Chemer and Karlsson for the broadcast of athletic events syndicated by Metro, and communications concerning these matters were sent to and from the Rockville office. [354A, 895A, 896A, 898A, 904A, 906A, 914A and 917A].

- Three law firms used extensively by Metro sent their bills to the Rockville office. [932A, 933A and 937A].

- Although after April 1984, Metro's primary banking relationship was with Mellon and cash management for TCS and its subsidiaries was centralized in Pittsburgh, Metro continued to maintain a banking relationship with American Security National Bank in Washington, D.C. (near Rockville) and maintained deposit accounts there. [926A, 1146A and 1147A].

- When Metro decided to close its Rockville office, it issued a press release announcing that "the METROSPORTS headquarters, previously in Rockville, Maryland, are being moved into the firm's new RIDC Industrial Park building, in O'Hara Township, effective December 3." This press release was sent to athletic directors, athletic conferences, newspapers, and broadcasting outlets with whom Metro did business. [360A, 980A].[6]

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[6] The testimony of the Committee's own witnesses lent strong support to Mellon's case. For example, Nelson Goldberg testified that he "was not involved in the day to day activities of Metro" [526A], that Klompus was "the ultimate responsible person" in charge of producing the broadcasts of the sporting events to which Metro held the rights [528-529A], that Klompus remained in control of Metro until the Rockville office was closed, and that "the make up of the company

The Third Circuit concluded: "If, as it must be, the focus of the inquiry is shifted from analyzing the relationship between the parent corporation and its subsidiary to where Metro, the debtor, in fact had its headquarters, overwhelming evidence supports the conclusion that Metro's chief executive office remained in Rockville, Maryland until it announced the transfer in the press in December of 1984." App. 17-20. Determining the proper "focus of the inquiry" was surely a valid exercise of the Third Circuit's plenary powers of review, but even if it were not, there would be sufficient play in the "clearly erroneous" standard to permit a reversal without a remand for further trial where, as here, the appellate court sees that the trial court's decision flies in the face of overwhelming evidence.

D. The Third Circuit's Decision Does Not Present an Issue Justifying Review by This Court.

The Committee fails utterly to present any "special and important" reasons meeting the strict standards that govern the granting of a writ of certiorari. Supreme Court Rule 10's partial list of issues for which certiorari might be granted, such as a conflict among the circuits on a federal question or an improper highest state court determination of a matter of federal law, illustrate the magnitude of problem that must be presented by the lower court decision for this Court to commit its valuable and scarce resources. The question addressed in the instant case, however, is merely one of interpretation of the Pennsylvania Uniform Commercial Code, obviously one of the purest of pure state law questions. Moreover, far from being in conflict with the

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never really permitted me to assume control of it since the rights, the acquisitions that Metro had ... in all of these different conferences were direct contacts that Lenny Klompus had made with them and negotiated with them.... In fact, the vast majority of these people that were working with Metro I had never seen, met or spoken to." [530A]. As succinctly summarized by Carol Adamek, another former Metro employee called as a witness by the Committee: "Basically, [Klompus] was Metrosports." [473A]

decisions of the court or of other courts of appeal, the Third Circuit's analytical approach is in perfect harmony with the two other leading circuit court decisions in this area.

Although the Committee argues that the Third Circuit's actions will wreak havoc upon the state and federal court systems, the Committee has made no believable argument to sustain such allegations. What the Third Circuit did in this case was nothing more nor less than to use its plenary powers of review to overrule a lower court's decision on what the Third Circuit, as well as other Circuits, have determined to be a question of law. The parameters of the "clearly erroneous" standard have been clearly defined by the decisions of this Court over the years. Nothing that the Committee has presented suggests that there is any further need to clarify the standard. Even if there were any such need, this case, involving as it does the construction of a state statute in the context of largely undisputed facts, is hardly an appropriate vehicle for providing such clarification.

IV. CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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